

An Examination of the Meaning and Scope of the Basis of the Uninsured Motorist Policy Endorsement: "All Sums the Insured is Legally Entitled to Recover"

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COMMENTS

Symposium: Uninsured Motorist Endorsement

INTRODUCTION

The uninsured motorist endorsement to the automobile insurance policy is a form of first party insurance designed to protect persons injured in automobile accidents from losses which, because of the tortfeasors lack of liability coverage, would otherwise go uncompensated. This relatively new endorsement, which has been widely accepted by the motoring public, has given rise to problems of interpretation, not only because of its unique character but also because of the innumerable situations that have arisen wherein the coverage is applicable.

The authors, now members of the Wisconsin Bar, prepared these papers while enrolled, as students, in the 1970 Liability Insurance Seminar at Marquette University Law School. The areas examined by the authors merit the attention of the bench, the bar and the insurance industry, since they treat troublesome segments of the uninsured motorist endorsement.

Mr. Greenwald, in his article, "*An Examination of the Meaning and Scope of the Basis of the Uninsured Motorist Policy Endorsement: 'All Sums the Insured is Legally Entitled to Recover,'*" examines what benefits are to be paid under the endorsement. Mr. Mlakar, in his comment, "*The Uninsured Automobile*" deals with the meaning and scope of the definition of the uninsured automobile. Mr. Olson examines the scope and validity of the exclusion section of the UM policy and compares it with other provisions of the standard automobile policy in a comment entitled, "*The Exclusions Section of the Uninsured Motorist Endorsement of the Automobile Insurance Policy.*" Mr. Gass, in his comment, "*The Meaning, Scope and Validity of the 'Other Insurance' Provisions which Apply to the Uninsured Motorist Endorsement,*" considers the impact of other insurance, both UM coverage and general liability coverage, on the benefits to be awarded under the UM endorsement. Mr. Chartier in his comment, "*Arbitration: Uninsured Motorist Endorsement,*" attempts to give a general overview of the arbitration provision, a unique feature which has given rise to numerous questions of interpretation.

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AN EXAMINATION OF THE MEANING AND SCOPE
OF THE BASIS OF THE UNINSURED MOTORIST
POLICY ENDORSEMENT:
"ALL SUMS THE INSURED IS LEGALLY
ENTITLED TO RECOVER"

I. INTRODUCTION

A. *Public Demand for Minimization of Loss Resulting from Automobile Accidents.*

The automobile is perhaps the most expensive product the American consumer can purchase. For example, added onto the sale price is the cost of highways, maintenance and fuel, parking-storage facilities, pollution, insurance, and non-compensated losses resulting from automobile accidents. The public has complained more about the last two than any other. The Uninsured Motorist endorsement is a result of those complaints.

Since the birth of the assembly line automobile, the accident toll, in lives and dollars, has spiraled without indication of a slow-down—even in an age where a service module of an Appollo XIII can explode 50,000 miles from the atmosphere of the Earth, yet continue on its journey around the Moon and then land safely back on Earth without injury to its occupants.

It was not long after Henry Ford sold his first Model T that the question arose as to how to compensate automobile accident victims. The laws controlling compensation for bodily injury and property damage caused by acts of a *person other than the victim* controlled compensation. In order to spread the loss from individuals to those who used the automobile as a group, automobile liability insurance was introduced. Once the victim successfully obtained a judgment against the negligent operator, the operator's insurer would compensate the victim for his losses up to the limits of the insurance contract. However, this scheme of spreading loss, or even of awarding compensation to the victim of another's tortious conduct, did not operate where the tortfeasor was without liability coverage and was otherwise financially irresponsible.

The post-World War II boom witnessed a rapid expansion of the number of automobiles on America's highways and in America's urban areas. Concomitant with this increase was an increase in the incidence of accidents. (During the years of 1958-67 the number of deaths and personal injuries increased 43.6% and 48.7% respectively.)¹ As the incidence of ownership of motor vehicles and the correspondent accidents spiraled, the threat of loss due to a financially irresponsible motorist increased proportionately. It was not long before the legislatures and government officials—both state and federal—began a search

¹ Insuring the Automobile, How the Present System Works, Insurance Information Institute (1968).

for an effective control of the increasing losses to victims of the negligent and irresponsible motorist.²

B. Legislation to Minimize Loss.

Prior to the introduction of the Uninsured Motorist endorsement, the solutions adopted by state governments to ease the problem of loss were aimed only at encouraging *all* motorists to purchase and keep in effect liability insurance. This type of legislation can be divided into two classes—Financial Responsibility laws and Compulsory Insurance laws.

1. Financial Responsibility Laws.

The Wisconsin Financial Responsibility Act,³ typical of similar laws in the other states, is divided into two general sections, the first section commonly referred to as "security for past accidents,"⁴ and the second section commonly referred to as "financial responsibility for the future."⁵ Under the first section a motorist involved in an accident is required to furnish the state with proof that he is financially responsible for any judgment for damages resulting from such accident, or face suspension of his operator's permit until able to do so. A valid and enforceable liability policy, in effect at the time of the accident, with limits meeting statutory minimums (15/30/5 in Wisconsin⁶) will meet the requirements. The second classification requires a motorist who has been involved in an accident and has an unsatisfied judgment against him,⁷ or has had his license revoked, to furnish proof of financial responsibility. Upon the filing of a valid automobile liability insurance policy, the operator will meet the requirements necessary under the Act to entitle him to have his license renewed.⁸

Financial responsibility laws, however, leave several gaps in the ideal of complete compensation to accident victims. In a compensation system based upon fault, the injured party can only receive compensation if the negligent party is financially responsible. The irresponsible motorist is not required to become responsible until he has had one accident (or has exhibited such poor driving methods that he has had his license revoked, in which case he probably has already been in an accident). Therefore, the victims of his "free" accident remain uncompensated. The second gap is created where the irresponsible motorist ac-

² State governments had been searching for the last forty years to cure this problem. In 1925 the first financial responsibility law was passed in Connecticut and in the same year, the first compulsory insurance plan, requiring all motorists to acquire liability insurance as a prerequisite to registration of their automobiles, was introduced and passed into law in Massachusetts. A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE*, 45 (1969).

³ WIS. STAT. Ch. 344 (1967).

⁴ WIS. STAT. §§ 344.12-344.22 (1967).

⁵ WIS. STAT. §§ 344.24-344.41 (1967).

⁶ WIS. STAT. § 344.15 (1967) as amended by Wis. Laws of 1969.

⁷ WIS. STAT. § 344.25 (1967).

⁸ WIS. STAT. § 344.35 (1967) as amended by Wis. Laws of 1969.

⁹ WIS. STAT. § 344.30 (1967).

quires insurance in accordance with the financial responsibility laws, but then, after full compliance with such laws, permits the insurance to lapse and again becomes uninsured. A third situation arises where the negligent operator had a valid liability insurance policy at the time of an accident but after the accident did not cooperate with his insurer or acted in a manner which would permit the insurance company to deny coverage. The victim again would go uncompensated.

2. Compulsory Insurance Laws.

A second solution to the problems created by the irresponsible motorist, adopted by some state legislatures, is compulsory insurance. These laws, adopted in only three states,¹⁰ generally provide that no registration of a motor vehicle may be accepted without proof that a policy of liability insurance has been issued to the owner of the vehicle. Theoretically then, since each car on the road must be licensed, every car will be an insured automobile. If there is an accident, each victim will be compensated. Theory never succeeds, and in the case of compulsory insurance, larger gaps than those felt by the inadequacies of financial responsibility laws exist. There is no effective way to administer the law to compel each operator of a motor vehicle to keep the insurance in force once the automobile has been registered. There is also the problem of the operator who simply does not license his automobile. The amount of "free accidents" a driver receives under this type of legislation is limitless, while there is at least some control under the financial responsibility laws.

Neither type of legislation can cover the situation where an unlicensed driver operates another's car without permission.¹¹ Nor does either type cover the situation where the negligent operator drives away from the scene of the accident and his identity remains unknown. Unless the victim of an accident caused by the negligent acts of a financially irresponsible motorist has insurance specifically protecting him from such risks, there is a high degree of probability that he will be uncompensated for his loss.

C. Insurance Protecting an Injured Party from Loss Caused by an Irresponsible Motorist.

Insurance coverage which assumes the risk of loss caused by an uninsured motorist does exist. Such coverage has appeared in three

¹⁰ Massachusetts: MASS. GEN. LAWS ch. 175 § 113A (1959); New York: N.Y. VEHICLE AND TRAFFIC LAWS § 312 (McKinney 1960); North Carolina: N.C. GEN. STATS. §§ 20-309 through 20-319 (1965).

¹¹ In such case, even if the owner of the automobile has been issued a liability policy with a broad omnibus clause as required by state statute, the policy will not apply and the vehicle will be an uninsured vehicle. See WIS. STAT. § 204.30(3) (1967); Northwestern Nat'l Ins. Co. Policy, Coverage A—Bodily Injury Liability; Coverage B—Property Damage Liability; State Farm Mut. Auto. Ins. Co. Policy, Coverage A—Bodily Injury Liability; Coverage B—Property Damage Liability.

forms: (1) Unsatisfied Judgment Funds; (2) Unsatisfied Judgment Insurance; and (3) the Uninsured Motorist Endorsement in automobile accident insurance policies.

1. Unsatisfied Judgment Funds.

The Unsatisfied Judgment Funds, pioneered in Manitoba, Canada,¹² and followed in the United States by North Dakota,¹³ Maryland,¹⁴ Michigan,¹⁵ New Jersey,¹⁶ and New York,¹⁷ generally provide that a fee is paid by each owner of an automobile to a state controlled fund from which a resident, who has secured in a state court an unsatisfied judgment arising out of the operation of a motor vehicle, may obtain *limited* compensation.

2. Unsatisfied Judgment Insurance.

Privately owned insurance companies have offered insurance identical to that provided by the Unsatisfied Judgment Funds in states in which there is no state fund.¹⁸ Again, this provides *limited* compensation according to a schedule. It also requires that the victim first obtain a judgment against the negligent motorist, and then attempt execution upon the judgment. Because a prior suit is necessary before coverage can be realized, the insured will be no better off than if he had not purchased such insurance where he is unable, or it is highly impracticable, to obtain jurisdiction over the negligent motorist. If the insured is able to bring suit, the insurer will be subjected to the risks of a default judgment, thereby encouraging fraudulent claims.¹⁹ Possibly because of the above situations, neither the insurance companies nor the motoring public have contracted extensively for such coverage.

3. The Development of Uninsured Motorist Insurance

After World War II, the public and legislators demanded a more effective compensation system to protect victims of automobile accidents. Many state legislators introduced compulsory insurance legislation. However, the continuing presence of uninsured motorists in the states that had adopted compulsory insurance laws disclosed the inadequacy

¹² For an informative book on the Manitoba legislation and similar legislation enacted in other Canadian Provinces (Alberta, British Columbia, Newfoundland, Nova Scotia, Ontario, and Prince Edward Island) see V. HALLMAN, *UNSATISFIED JUDGMENT FUNDS* (1968).

¹³ N.D. CENT. CODE, §§ 39-17-01 (Supp. 1957).

¹⁴ Md. ANN. CODE, Art 661/2, §§ 150-79 (1957).

¹⁵ MICH. COMM. LAWS, §§ 257.1101-31 (Supp. 1965).

¹⁶ N.J. STAT. ANN., §§ 6-612-91 (Supp. 1957).

¹⁷ N.Y. INS. LAW, §§ 600-26 (McKinney 1959); see also, WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE R, fn. 16-18 (1969).

¹⁸ This insurance was first offered in 1925 by the Utilities Indem. Exchange. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 13 fn. 26 (1969).

¹⁹ In order to prevent fraud, the insurance companies required as a condition precedent to recovery that the insured had to prosecute to judgment in a suit without default. This measure was neither practicable nor workable. Both the insurance companies and their insureds were dissatisfied with such an arrangement.

of such legislation.²⁰ The demand for an effective system could not be satisfied by legislation which attempted to "control" the uninsured motorist. The adoption of "no-fault" plans such as the "Saskatchewan" plan evidenced this new trend, as did the revitalization of interest in the infamous "Columbia Report" which was published in 1933.²¹

By 1954, "The clamor of sociologists, . . . the threat of legislators to enact compulsory insurance laws, and fear of the insurance companies that they would be forced to underwrite the undesirable risk"²² influenced the insurance industry to devise a compensation plan which would provide more effective protection to its insureds who were innocent victims of an irresponsible driver. In 1955 the National Bureau of Underwriters promulgated the standard Uninsured Motorist Endorsement.²³ Shortly after its introduction, various states passed statutes requiring that the new provision at least be offered with every automobile liability policy issued in the particular state.²⁴

II. NATURE OF UNINSURED MOTORIST INSURANCE— COMPARISON WITH OTHER PROVISIONS

A. Operation of Uninsured Motorist Endorsement.

The Uninsured Motorist endorsement was designed to compensate the insured for loss suffered due to the fault of a driver not covered by

²⁰ For a general discussion of this demand see, Widiss, *Perspectives On Uninsured Motorist Coverage*, 62 N.W. L. REV. 497 (1967). For example, 80-85% of the drivers in New York carried liability insurance in the 1950's. Nevertheless, the loss attributable to uninsured motorists in that state exceeded \$7,000,000 per year. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 10 (1969).

²¹ WIDISS, *supra* note 20 at 10. The Columbia report was the first work published advocating a "no-fault" insurance plan. See, *Compensation for Automobile Accidents: A Symposium*, 32 COLUMBIA L. REV. 785 (1932).

²² H. Hentmann, *Uninsured Motorist Coverage*, 12 CLEV.-MAR. L. REV. 66 (1963); see also, fn. 6 of this article.

²³ *Sahloff v. Western Cas. & Surety Co.*, 45 Wis. 2d 60, 171 N.W.2d 914 (1969); see also, WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 14 fn. 32 (1969).

²⁴ Wisconsin, in 1965, adopted such a statute. Wis. Laws 1965 ch. 486, sec. 1 codified as Wis. STAT. § 204.30(5) (1967). The statute is similar to that of most states, but provided that, although the insurer must offer the coverage, the insured can choose not to purchase it:

204.30(5) UNINSURED MOTORIST COVERAGE. (a) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by a person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto in limits for bodily injury or death in the amount of at least \$15,000 per person and \$30,000 per accident [By amendment to this section by Wis. Laws of 1969 ch. 165 the limits were increased from 10/20] under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, because of bodily injury, sickness or disease, including death resulting therefrom. The named insured has the right to reject such coverage. . . .

By 1968, 46 states had passed an uninsured motorist law. For a list of states see, J. Corbly, *Uninsured Motorist Protection*, DRI Monograph (1968), Appendix A.

liability insurance as if the uninsured motorist was in fact insured in accordance with the state financial responsibility law requirements.²⁵ After an accident in which the insured has been injured, the insurer and the insured are required to settle the claim, or if they fail to agree, to arbitrate. Once the insurer has compensated the victim, the insurer becomes subrogated to the rights of the insured against the uninsured motorist. In this manner the insured may recover from his own insurer "*all sums which he is legally entitled to recover as damages from an uninsured motorist.*" Theoretically responsible drivers are thereby protected from the irresponsible driver.

B. *Comparison of the Uninsured Motorist With Other Endorsement.*

The standard Family Combination Automobile Policy is composed of four basic insuring endorsements:

- (1) Liability Coverage;
- (2) Property Damage Coverage;
- (3) Medical Payments Coverage;
- (5) Uninsured Motorist Coverage.

Each part provides for payment to or on behalf of the insured. However, the nature of the type of protection is not identical as is evidenced by the language in each section comprising the basis of the separate insuring agreements.

1. Liability Coverage

In the liability endorsement the insurer agrees

"... To pay on behalf of the insured *all sums* which the *insured shall become legally obligated to pay* as damages . . ."

The benefits of such insurance accrue to someone other than the insured where such person has suffered damages resulting from the insured's negligent conduct (fault). This type of insurance is generally regarded as "third party" insurance. The company is not liable on the policy until a judgment is rendered against its insured, or the company, which defends any action against the insured, reaches a settlement agreement with the injured party.²⁶

²⁵ Generally, if a motorist is an insured under a liability policy in which it has limits that are equal to or greater than the minimum limits of liability required by Financial Responsibility laws, then an injured party is not entitled to make a claim under his Uninsured Motorist Coverage. But in *Porter v. Empire Fire and Marine Insurance Company*, 12 Ariz. App. 2, 467 P.2d 77 (1970), the second division of the Court of Appeals of Arizona permitted an insured to recover under his Uninsured Motorist Coverage where the tortfeasor was *underinsured*. An underinsured motorist is one who is insured under a liability policy which has limits at least equal to those required by the Financial Responsibility laws, but such insurance is not sufficient to pay all injured parties in a multiple injury accident an amount equal to the single limits required by law. In *Porter* five persons were injured in the accident caused by a driver who had only a 10/20 liability policy (\$10,000 limit per person, \$20,000 limit per occurrence). As a result, the plaintiff-insured only recovered \$2,500 from the tortfeasor's liability carrier and was left with \$7,500 in unsatisfied damages. The Court of Appeals permitted the plaintiff-insured to recover such amount from his Uninsured Motorist Carrier.

²⁶ In Wisconsin the injured party can bring a direct action against the insurance

2. Property Damage Coverage

In the standard Family Combination Automobile Policy, property damage protection is divided into several subsections, the distinguishing feature of each subsection being the nature of the cause of damage. However, the basis of each insuring agreement is identical:

To pay to the insured for loss caused [by the particular cause] to the owned or to a non-owned automobile . . .

The liability of the insurer is established without regard or consideration of "fault." Once the insured has established the amount of damages resulting from a cause, the risk of which is covered under the policy, the insured has a right to recover from the company in accordance with the deductible provisions.

3. Medical Payments Coverage.²⁷

Under the insuring agreement the insurer promises

"To pay to the insured all reasonable expenses incurred within one year from the date of accident . . ."

Similar to coverage for property damage, the liability of the insurer is not based upon the fault of any party involved, but is in effect whenever the insured establishes that he has incurred medical expenses as the result of an accident. Like the property protection afforded above, it is commonly referred to as "first party" insurance—payment is directly to the insured for his loss.

4. Uninsured Motorist Coverage.

The Uninsured Motorist provision is a self-contained contract of insurance with separate insuring agreements, definitions of terms used in that agreement, and its own exclusions. It is "first party" insurance to the extent that payment is directly to the insured for his loss. However, it is "third party" insurance to the extent that it is based on the fault of one party and the freedom from fault of another party. The language in the endorsement which constitutes the basis of the insuring agreement is a combination of the language found in the other provisions, indicating its hybrid character and nature:

*. . . To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages . . .*³²

The agreement is a contractual promise to pay—it is *not* free insurance for the uninsured motorist. Its only conditions are that the following must be established:

company without first bringing suit against the insured tortfeasor. WIS. STAT. § 260.11(1) (1967). However, the suit proceeds as if the defendant in the action was the insured, whose negligence and liability to the plaintiff has not yet been determined.

²⁷ For a comprehensive examination of this endorsement see Poulos, Melendes and Craig, *Medical Payments Provision of the Automobile Insurance Policy*, 52 MARQ. L. REV. 445 (1970).

- (1) The alleged uninsured motorist was in fact uninsured;
- (2) The uninsured motorist was at fault;
- (3) The insured's conduct was free of contributory negligence;
- (4) The amount of damages suffered by the insured as a result of bodily injury sustained in the accident;
- (5) Compliance with the other conditions of the policy requiring notice, cooperation, and other matters;
- (6) The accident arose out of the ownership, maintenance or use of the *uninsured* motor vehicle.

III. INTERPRETATION PROBLEMS OF "LEGALLY ENTITLED"

A. *Suit Against the Uninsured Motorist As Condition Precedent.*

1. Generally

It has been argued that the phrase "legally entitled to recover" requires, as a condition precedent, that the insured successfully secure a judgment against the uninsured motorist. In *Hill v. Seaboard Marine Insurance Co.*,²⁸ the plaintiff was injured when an uninsured automobile operated by an uninsured motorist, struck the rear of the car the plaintiff was operating. The insurer denied liability under the Uninsured Motorist provision of the policy it had issued to the plaintiff. The insured then brought an action against Seaboard to recover under such provisions. At the trial the insurer unsuccessfully objected to the admission of evidence offered in order to establish the negligence of the uninsured motorist. On appeal the objection was construed to be a contention that the insured must first bring an action against the uninsured motorist before he may be entitled to recover against the insurer. The appellate court, in rejecting this contention, stated that the policy "clearly" did not permit such construction, and that the language "shall be legally entitled to recover" did not convey such an intent when construed in favor of coverage. Furthermore, the court argued:

For decades insurance companies have been writing unsatisfied judgment policies and are knowledgeable in the art of specifically requiring an unsatisfied judgment as a condition precedent to their liability and to a suit directly against the insurer, if that is the insurer's intent. Here there is no language in the policy that requires an unsatisfied judgment to establish legal liability or the amount thereof, of the owner or operator of the uninsured automobile.²⁹

The court went on to declare that the proper action to be taken by an insured who has been injured in a collision with an uninsured motorist is an action against the insurance company.

The Wisconsin Supreme Court, in *Sahloff v. Western Casualty & Surety Co.*,³⁰ concurred in theory that the insured need not obtain a

²⁸ 374 S.W.2d 606 (Mo. App. 1963).

²⁹ *Id.* at 611.

³⁰ 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

judgment against the uninsured motorist before suing his insurer. The court, in an opinion written by Chief Justice Hallows, stated:

In fact, the uninsured motorist endorsement does not require suit and expressly provides that no judgment against the uninsured motorist is conclusive upon the insurer's interests unless the action by the insured was with the written consent of the insurer.³¹

2. Requirement Upheld

Not only is it the *minority* position which upholds the insurer's argument that the words "legally entitled" require the insured to prosecute to judgment the uninsured motorist prior to recovery against the insurer, but the cases comprising the minority position have limited operation. For example, *Squire v. National Grange Mutual Insurance Co.*³² did hold that recovery under uninsured motorist coverage is conditional upon the establishment of legal liability through suit against the uninsured motorist. However, an examination of the fact situation before the court reveals more than the bare rule of law. In *Squires* the plaintiffs, the executor and administrator of the deceased insured, had recovered a judgment against two drivers who were racing their cars on the highway when one of the cars collided with the car the deceased insured was occupying. At the time of the accident each of the racing motor vehicles was covered by a policy of insurance. However, by the time the trial against the two drivers was about to begin, there was no insurance available—one liability carrier was removed on a policy defense and the other liability carrier had gone into receivership. Not until this time had the deceased's executor or administrator sent notice of claim or the suit papers in the action against the negligent motorists to the deceased's uninsured motorist carrier. The carrier denied liability on the basis of breach of a policy provision requiring submission to the insurer of the notice of claim as soon as practicable and service of process upon the company at the commencement of any suit against an uninsured motorist. In holding that the plaintiffs had complied with the policy provisions, the court buttressed its argument by stating that the plaintiffs had to sue the motorists in order to establish their legal liability. In this light, the rule appears to have been adopted

³¹ *Id.* at 66-67, 171 N.W.2d at 916. See also, *State Farm Mut. Auto. Ins. Co. v. Matlock*, 446 S.W.2d 81 (Tex. Civ. App. 1969). (Nothing in recently passed statute which required inclusion of Uninsured Motorist in all automobile liability policies issued in the state, unless insurer specifically rejects such coverage, required the insured to bring suit against the uninsured motorist as condition precedent to recover from his insurer); *Hickey v. Insurance Co. of North America*, 239 F.Supp. 109 (ED Tenn ND 1965) (Parties intention as displayed in the policy, was to the issues between themselves, therefore the best procedure to follow was to allow the insured to sue the insurer rather than the uninsured motorist); *Wortman v. Safeco Ins. Co. of America*, 227 F. Supp. 460 (E.D. Ark. 1963); *Boughton v. Farmers Ins. Exchange*, 354 P.2d 1085 (Okla. 1960); *Travelers Indem. Co. v. Devose*, 226 N.Y.S.2d 16 (N.Y. Sup. Ct. 1962).

³² 145 S.E.2d 673 (1965).

to aid recovery, not as a reason for denying compensation for injury caused by an uninsured motorist.

3. Effect of Invalidity of Compulsory Arbitration.

The enforceability of the arbitration provision³³ would appear to have an important bearing on the issue of whether the insured must obtain a judgment against the irresponsible motorist prior to recovery on the policy in order to establish the uninsured's legal liability. One of the reasons the insurance companies have inserted the arbitration clause is their fear that a jury, when faced with the duty to determine who is at fault in an automobile accident, will violate that duty where the "poor and innocent" plaintiff is suing the "rich" insurance company which has already been paid for the coverage it is denying. However, the reported cases do not appear to be influenced by this consideration and, even though they invalidate the compulsory arbitration provision, they hold that the insured can maintain an action against his insurer without initially prosecuting the uninsured motorist.

In *Wright v. Fidelity & Casualty Co. of New York*³⁴ the plaintiff, a passenger in an automobile driven by his daughter-in-law and owned by his son, was injured when the automobile was struck from the rear by a vehicle operated by an uninsured motorist. Fidelity had issued an automobile liability policy containing the standard uninsured motorist endorsement to the plaintiff. That endorsement provided that if the insured and the insurer could not agree on the claim, and if the insured did not wish to arbitrate, then the *only* course that could be pursued was an action *against the insurance company*. The Uninsured Motorist endorsement in the policy issued by Liberty Mutual Insurance Company to the plaintiff's son did not contain the alternative to arbitration—it was similar to the standard clause making arbitration compulsory. Both of the insurance companies demurred on the basis that there must be a prior determination of legal liability on the part of the uninsured motorist. Both demurrers were sustained by the trial court. On appeal it was held that it was error to sustain either demurrer. The demurrer of Fidelity should have been overruled because the contract itself provided that the disputes between the insurer and insured could be determined by suit against the company at the election of the insured. In reversing the order sustaining Liberty's demurrer, the court held that the compulsory arbitration provision was invalid because it ousted the jurisdiction of the court to determine liability and damages. On the basis of *Williams v. Nationwide Insurance Co.*,³⁵ which the court stated left the clear inference that a suit against the uninsured motorist to determine legal liability was not a condition precedent to recovery on the policy, it was held that

³³ The arbitration clause of the coverage is extensively examined in: *Arbitration: Uninsured Motorist Provision*, MARQ. L. REV. (1970).

³⁴ 270 N.C. 577, 155 S.E.2d 100 (1967).

³⁵ 269 N.C. 265, 152 S.E.2d 102 (1967).

the insured could maintain an action on the contract without prior suit against the uninsured motorist.

Prior to either North Carolina decision a federal district court, in *Hickey v. Insurance Co. of North America*,³⁶ was faced with the issue of whether or not suit against the uninsured motorist was a condition precedent to recovery against the uninsured motorist carrier where state law had invalidated the compulsory arbitration provisions. In *Hickey* the insured's minor son, who had been playing with friends next to the road, attempted to cross the street when he was struck by an uninsured motorist. The insured brought an action against the insurance carrier, alleging that the cause of the accident was the sole negligence of the uninsured, rather than first obtaining a judgment against the motorist and then bringing suit against the insurance company. The insurer objected to the suit on grounds that the plaintiff had not yet established the legal liability of the uninsured motorist, or in the alternative, had not submitted to arbitration.

Because the laws of Tennessee prohibited arbitration of disputes where a minor was a party in interest, the court held that the compulsory arbitration provision was invalid in this particular case. The court then turned to an earlier decision handed down in the Eastern District of Arkansas which had held that the insurance policy did not provide the procedure to be followed in determining legal liability where the insurer and the insured could not agree and the compulsory arbitration clause was invalid.³⁷ In *Wortman* the court held that it appeared from the policy that the parties intended to determine the issues between themselves, therefore, the best procedure to follow would be to allow the insured to sue the insurance company in a court of law rather than sue the uninsured motorist, be awarded a judgment, then bring an action against the insurance company.³⁸

B. Allocation of the Burden of Proof

Although the uninsured motorist endorsement is clear as to what must be established before the insured may recover or the insurer is

³⁶ 239 F.Supp. 109 (E.D. Tenn. 1965).

³⁷ *Wortman v. Safeco Ins. Co. of America*, 227 F.Supp. 460 (E.D. Ark. 1963).

³⁸ But see *Rogers v. United Service Auto. Ass.*, 410 F.2d 598 (6 Cir. 1969). (Insured claims that the uninsured motorist was at fault and the uninsured motorist claimed the insured was at fault, thus establishing a real issue between the two drivers. The insurance company gave its consent to the insured to sue the uninsured motorist, however, the insured, without demanding arbitration, brought suit against his insurer. The insurer moved for summary judgment on the grounds that the insured had no cause of action against the company until establishing the liability of the uninsured motorist in a suit against such party, since the company had given its consent to such suit. Under Arkansas law, the compulsory arbitration provision was invalid, thus the trial court, relying on *Wortman* and *Hickey* denied the insurer's motion. The court of appeals reversed, distinguishing *Wortman* and *Hickey* on the grounds that the insurer had not given its consent to sue in those cases, therefore the insurance company in the case at bar either had to initially sue the uninsured motorist to establish legal liability or arbitrate.

liable, there are no provisions indicating who has the burden of proving those facts which would either entitle the insured to recover or the insurer to deny liability. As a result, the courts will have to establish rules delegating the burden of proof, or trial judges and arbitrators will be left with the choice of following present evidentiary rules in tort and contract actions or of adopting whatever rules they would prefer in any particular case. Generally there would be very few problems in proving the non-existence of liability insurance on the part of the alleged tortfeasor, compliance with conditions of the policy, or that the accident arose out of the ownership, maintenance or use of an uninsured motor vehicle. The filing requirements of financial responsibility laws will provide prima facie proof of the absence of liability insurance, while recent court decisions requiring the insurer to show prejudice where the insured has not complied with conditions of the policy have effectively transferred the burden to come forward with the evidence to the insurer.⁴⁰

1. Possible Allocations.

a. *Allocation according to the rules applicable in an action on a contract.* If the insured is making his claim for recovery upon the contract, then, according to the general rules of evidence, he has the burden of establishing that he has complied with all of the conditions precedent of the contract. The basic condition precedent to the uninsured motorist endorsement is that the insured is *legally entitled* to recover against the uninsured motorist, *i.e.*, that he was free of contributory negligence, that the uninsured motorist was negligent and that the injuries suffered by the insured, if any, were the proximate result of such negligence. In addition, the insured has to prove that the motorist was uninsured, that he was operating, using or performing maintenance work on such vehicle at the time of the accident, and that the insured had complied with the contract provisions requiring notice and cooperation.

b. *Allocating the burden of proof of any one of the ultimate facts to either party in various combinations.* The second alternative available is to split the burden of proof of each fact in issue in any one of six possible combinations.⁴¹ Which combination should be adopted

³⁹ About the only questions which may occur with any regularity would be the case where the negligent motorist's insurer becomes insolvent subsequent to the accident, but prior to the insured's recovery, or where the liability insurer denies liability. Not only questions of facts are raised by these issues, but also questions of law and the court will probably decide the issues presented.

⁴⁰ See Comment, *The Corporation Clause in Automobile Liability Insurance Policies*, 51 MARQ. L. REV. 434 (1968); Comment, *The Requirements and Effects of the Notice Condition in the Automobile Liability Insurance Policy*, MARQ. L. REV. 366 (1967).

⁴¹ For example, assume that there are only three facts disputed: fault of the insured, fault of the uninsured, and damages (those facts most often in dis-

could be based on several considerations, one being that they be divided in a manner comparable to the division in a tort action as if the insured were bringing the action against the uninsured driver. The burden could be upon the party in the most beneficial position to prove the fact, or divided in a manner that would favor compensation, but provide a check against fraud. The latter would certainly be the most flexible alternative.

c. Allocating the burden of proof of each ultimate fact which could be a basis for denial or recovery. The third alternative would be to place the entire burden of proof or burden to come forward with the evidence upon the insurer before the insurer can deny the claim of the insured. This alternative does not seem to be either a practical or equitable allocation because of its rigidity and the opportunity it creates for fraudulent claims.⁴²

2. Is the Problem only Academic Where Arbitration is Pursued?

Widiss suggests that the problem may only be academic where the parties attempt to resolve their differences by arbitration.⁴³ Such result flows from the power of the arbiter to disregard either common law

pute in a tort action where the alleged tortfeasor was insured), the burden of proof of the facts could be grouped together as follows:

<i>Burden on Insured</i>	<i>Burden on Insurer</i>
1. Fault of uninsured	Damages
Freedom of Contributory Negligence	
2. Fault of uninsured	Contributory negligence
Damages	
3. Freedom of Contributory Negligence	Lack of fault upon part of the uninsured
Damages	
	Lack of fault upon part of uninsured
5. Fault of uninsured	Damages
	Contributory fault of the insured
6. Freedom from Contributory Fault	Damages
	Lack of fault upon part of uninsured

⁴² For example, the insurer could argue that since he was actually involved, and since he knows the extent of his injuries, it would be better to allocate the burden to the insured. While the insured would argue that the costs of meeting such burden can only be handled by the insurance company.

Widiss proposes that:

(I)t seems desirable to provide the insured with some advantage by placing the burden of proof and/or persuasion on the insurance company. It should be recognized that such an allocation does not change the character of this insurance, nor does it affect in any way the terms of coverage. Such an allocation of the burden of proof and/or persuasion only favors the insured in those instances where the insurance company cannot produce sufficient evidence to show that the insured was responsible for the accident. In any case where the insurance company can prove that the insured-claimant was at fault, there would be no recovery. Thus, by shifting the burden of proof to the insurer, compensation is assured in those areas when neither side has sufficient evidence to convince the trier of fact.

WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 44 (1969).

⁴³ *Id.* at 42.

or statutory rules of evidence. The results of a survey of 180 arbiters conducted by the University of Chicago Law School⁴⁴ showed that the arbitrators believed, almost unanimously, that both parties should share the burden of proof, at least in some cases. However 75% of the arbiters believed that ultimately the burden should fall with the party claiming the existence of the particular fact in issue.⁴⁵

3. Appellate Decisions Allocating the Burden of Proof or the Burden of Persuasion.

Very few cases have faced the issue as to what the proper allocation of proof or persuasion is in a suit or arbitration hearing by the insured against the insurer brought to recover under the Uninsured Motorist endorsement. The decisions that have discussed allocation have only mentioned that the insurer or insured had the burden to establish the disputed fact. When used as authority, the decisions are always subject to the attack that the pronouncement was only "dicta" and therefore not binding or indicative of what the law should be.⁴⁶

In *Hill v. Seaboard Fire & Marine Insurance Co.*,⁴⁷ discussed *supra*, the insurer alleged on appeal that the trial court erroneously found that the plaintiff had sustained his burden of proving that the other driver was in fact an uninsured motorist. The court agreed with the defendant to the extent that the plaintiff did have the burden showing that the motorist was in fact an uninsured motorist, that the uninsured motorist was liable, that the insured's injuries and damages were the prox-

⁴⁴ See Mentschikoff, *Commercial Arbitration*, 61 COLUMBIA L. REV. 846 (1961).

⁴⁵ From this Widiss argues that the insurance company using an endorsement calling for arbitration has in effect abandoned the traditional allocations that probably would have been adhered to in the judicial process and therefore, in a particular case, "if there are sufficiently cogent and compelling reasons to warrant a different approach" the traditional allocation should not prevail. WIDISS, note 49 *supra*, at 42.

⁴⁶ In *Valdes v. Prudence Mutual Casualty Company*, 226 So. 2d 119 (Fla. App. 1969) the insured introduced into evidence records of the Financial Responsibility Division and the office of the Insurance Commissioner which showed that the tortfeasor was uninsured at the time of the accident. The trial court granted the defendant-insurer's motion for directed verdict when it was proved that the tortfeasor was using a Virginia operator's license but the vehicle operated by the tortfeasor was registered in Florida. The insurer argued that the insured failed to prove that the tortfeasor had no liability insurance issued to him in Virginia; therefore, he had not met his burden of proof. The Supreme Court reversed holding that the insured had established a prima facie case and, therefore, the insurer had the burden to come forward with the evidence. The Court, however, did not discuss the question of who, in fact, has the burden of proof or what degree of proof is required. But see *Dalton v. Allstate Insurance Co.*, 234 So. 2d 455 (Ga. App. 1970) where it was held that the insured has the burden of proving the causal negligence of the tortfeasor and that such tortfeasor was uninsured. The court relied upon contract rules to determine who had the burden:

"(I)n accordance with the general rules relating to the burden of proof in civil actions, the burden in an action on an insurance contract is on the plaintiff (insured) to establish every fact in issue which is essential to his cause of action, and that his claim is within the policy coverage . . ."

(Citations omitted)

⁴⁷ 374 S.W.2d 606 (Mo. App. 1963).

mate result of negligent conduct of the uninsured motorist. No mention was made as to whether the insured had to prove that she was free of contributory negligence, or that a claim of contributory negligence was a defense to the action and therefore required to be established by the insurer.⁴⁸

In the interest of protecting state uninsured motorist funds, the courts may allocate the entire burden of proof of the ultimate facts to the injured claimant by interpreting the scope of the language "legally entitled to recover" as going beyond the mere retention of the fault principle. This result is illustrated by *DeLuca v. MVAIC*,⁴⁹ where the court stated that the phrase "legally entitled to recover" means that in order to obtain an arbitrable award against MVAIC, the insured party must prove those facts which he would have had to establish had he proceeded against the uninsured motorist: (1) the negligence of the uninsured motorist; (2) the extent of the insured's damages; and (3) the claimant's own freedom from contributory negligence.

The problem centering around the allocation of the burden of proof probably is more imagined and academic than real. If it is merely academic, then the insurance companies will have the tendency to leave the policy language as is and back away from amending the policy in order to resolve the question as to the burden of proof. This policy is a result of the insurance industry's reluctance to amend policy language for fear that the liberal courts will interpret any change as one made for the purpose of greater compensation for the insured.

C. Comparative Negligence.

In jurisdictions which have adopted the doctrine of comparative negligence,⁵⁰ a question may arise as to the scope of the phrase "legally entitled to recover." Under the comparative negligence doctrine, the plaintiff, even though he may have been negligent and such negligence was a proximate cause of his injuries, may recover in an action against a tortfeasor. An argument may exist in such jurisdictions contending that the scope of the phrase "legally entitled" requires only that the insured demonstrate that his negligence was of a degree which would not bar him from recovery against the uninsured motorist,⁵¹ and that it does not extend further to limit the *amount* he may recover. There-

⁴⁸ See, *Sahloff v. Western Cas. & Surety Co.*, 45 Wis. 2d 60, 171 N.W.2d 914; *Hernandez v. State Farm Mut. Auto. Ins. Co.*, 192 So. 2d 679 (La. App. 1966).

⁴⁹ 17 N.Y.2d 76, 215 N.E.2d 482 (1966).

⁵⁰ See Wis. STAT. § 895.045 (1967).

⁵¹ In jurisdictions such as Wisconsin which have adopted the "50% rule" the plaintiff may recover if his negligence is less than the defendant's; New Hampshire provides that the plaintiff can recover if his negligence is equal to or less than the defendant's, N.H. Laws of 1969, ch. 225; Mississippi has adopted the pure comparative negligence rule, where if the defendant is at all negligent the plaintiff can recover; see Ghiardi and Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 D. L. J. 537 (1969).

fore, if he is "legally entitled to recover," he may recover *all* of his damages without any deductions, up to the policy limits, from his insurer.

A more reasonable construction of the policy provisions would limit recovery to:

"... all sums which the insured or his legal representative shall be legally entitled to recover as damages . . ."

The insuring agreement does not promise to pay the insured for all of his damages arising out of personal injuries because he could successfully maintain an action against the uninsured motorist, but rather to pay the insured the total amount he would have been entitled to recover from the uninsured motorist, which includes a set-off based on his degree of negligence.

No reported case has considered the above arguments; in fact, no case has made any comment about comparative negligence other than to mention that a different result might occur in a comparative negligence state as opposed to a contributory negligence state in regard to when the insured is "legally entitled to recover."⁵²

D. Immunities.

It would be ironic if a concept as new as Uninsured Motorist coverage could be frustrated by "outmoded vestiges of antique law arising out of historical origins that long since have passed away and been forgotten . . ."⁵³ The concept of immunities do threaten just such a result. An obvious argument exists in favor of an insurer to bar recovery where its insured has been injured by an uninsured motorist who was immune from suit notwithstanding his failure, since the insured could not have recovered a judgment against the tortfeasor. Therefore, he is not entitled to recover under the provisions of an endorsement which is dependant upon the insured being "legally entitled" to recover from the uninsured tortfeasor.

*Noland v. Farmers Insurance Exchange*⁵⁴ is the only reported case in which such an argument was made by the carrier. Farmers has issued a policy of insurance covering the vehicle the plaintiff was occupying. The plaintiff's husband, an uninsured motorist, was driving an automobile which had collided with the insured vehicle. The plaintiff brought an action under the Uninsured Motorist provision to recover damages as a result of the accident. The insurer denied liability on the grounds that since the plaintiff could not maintain an action against her husband under Missouri law, she could not recover against the insurer—she was not "legally entitled to recover" her damages against the uninsured motorist. The court agreed with the insurer.

⁵² *Sahloff v. Western Cas. & Surety Co.*, 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

⁵³ PROSSER, *LAW OF TORTS*, § 85 (3d ed. 1964).

⁵⁴ 413 S.W.2d 530 (Mo. App. 1967).

This case, however, may have limited application because of the special language in the policy:

To pay all sums determined to be payable as provided below, which the owner or operator of an uninsured motor vehicle would be legally responsible to pay as damages to the insured because of bodily injuries sustained by the insured . . .

This language is not the same as the language in the standard uninsured motorist endorsement. This fact is important when considering the *Noland* decision because the court held that the language in that particular policy clearly indicated that the insured could recover only the amount she could recover from her husband.

The value of *Noland* as authority is subject to another limitation. At the time of the accident there was no Uninsured Motorist Coverage statute applicable. Today most states have adopted Uninsured Motorist Coverage statutes which have been construed to require that the insurer, under its uninsured motorist provisions, afford the same protection to the person injured in an accident caused by an uninsured motorist as if the tortfeasor was an insured under a liability policy providing minimum limits coverage. Prosser has noted that where there is liability insurance available, it is more difficult to maintain the stock arguments against abrogation of the immunity doctrine. Some courts have, in fact, refused to recognize the existence of the immunity where coverage otherwise existed.⁵⁵

Several arguments can be made against the result in *Noland*. First, it may be argued that an immunity is more analogous to a personal defense and operates to bar recovery *only* against a particular individual, and not against parties who have *no relationship* to that party, but are liable for the injuries suffered by the plaintiff. The insurer has no contractual or other personal relationship with the uninsured motorist which could entitle him to use this personal defense. In fact, if any relationship exists, it is as an adversary because the insurance company is subrogated to the rights of its insured. Therefore the insurer cannot interpose the defense of immunity.

Second, "legally entitled" merely indicates that the conduct of the uninsured motorist must be shown to be negligent and that such negligence was the proximate cause of the insured's injuries. Since the doctrine of immunities does not affect the character of the negligent acts of the possessor, such as the doctrine of privilege, but only bars recovery where the immunity exists, the insured, if he can prove that the uninsured motorist was negligent and that such negligence was the proximate cause of his injuries, may recover under the Uninsured Motorist endorsement, notwithstanding the existence of the immunity.⁵⁶

⁵⁵ PROSSER, LAW OF TORTS, § 116 (3d ed. 1964).

⁵⁶ This argument is based on the same principles used to argue that in a claim

E. *Statute of Limitations.*

In only one area of the law has there been a substantial amount of litigation and dispute involving the scope of "legally entitled to recover." The basic issue raised is whether a party who carries uninsured motorist insurance must demand arbitration or commence an action against the insurer within the time prescribed by the statute of limitations applicable to personal injury (tort) actions, or avail himself of the longer time period provided by the statute of limitations applicable to contract claims.

Because the language of the standard endorsement is silent as to time limitations, the insurer has had to rely upon the language "legally entitled to recover" to avoid application of the contract prescription period.

1. Arguments.

a. *Tort period should apply.* Three reasons have been advanced by the insurance industry for requiring the application of the tort prescription period to claims made against the insurer on the Uninsured Motorist endorsement.⁵⁷

(1) Where the time period for the commencement of a tort action against the uninsured motorist has run, the insured cannot maintain an action against the Uninsured Motorist insurance carrier because the precedent condition—that the insured be "legally entitled" to recover his damages from the uninsured motorist—has not, and cannot occur.

(2) Because the insurer's liability and the insured's claim is based on the offending motorist's tort, the considerations upon which the shorter tort statute of limitations is based should control the insured's rights.

(3) The insured's failure to promptly demand arbitration or com-

against the uninsured motorist insurance carrier, the contract statute of limitations applies rather than the tort state of limitations. See *Infra*, 33.

⁵⁷ These arguments have been put forward in a substantial number of cases and have been discussed extensively in several articles and publications. The following material is not a complete bibliography, but it is representative of the material available. *Cases*: *Sahloff v. Western Cas. & Sur. Co.*, 45 Wis. 2d 60, 171 N.W.2d 914 (1969); *Thomas v. Employers Mut. Fire Ins. Co.*, 208 So. 2d 374 (La. App. 1968), *reversed*, 253 La. 531, 218 So. 2d 584 (1969); *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 218 So. 2d 580, *affirming* 197 So. 2d 352 (La. App. 1967); *Fremin v. Collings*, 194 So. 2d 470 (La. App. 1967); *Hartford Acc. and Indem. Co. v. Mason*, 210 So. 2d 474 (Fla. App. 1968); *Schulz v. Allstate Ins. Co.*, 17 Ohio Misc. 83, 244 N.E.2d 546 (1968); *DeLuca v. MVAIC*, 17 N.Y.2d 76, 215 N.E.2d 482 (1966); *Schleif v. Hardware Dealer's Mut. Fire Ins. Co.*, 404 S.W.2d 490 (Tenn. 1966); *Articles*: *Annot.*, 28 A.L.R.3d 580 (1969); J. Laufer, *Insurance Against Lack of Insurance? A Dissent From the Uninsured Motorist Endorsement*, 1969 DUKE L. J. 227 (1969); H. Kuvin, *Uninsured Motorist Proceedings Of: Statute of Limitations; Survival of Actions Act; Wrongful Death Act; Subrogation Rights*, 29 INS. COUN. J. 127 (1962); H. Hentemann, *Uninsured Motorist Coverage*, 12 CLEV-MAR L. REV. 67 (1963); A. Widiss, *Perspectives On Uninsured Motorist Coverage*, 62 N.W. L. R51, 497 (1967-68); A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, §§ 2.22-2.26 (1969).

mence suit against the insurer would frustrate the insurer's right of subrogation against the negligent motorist.

b. *Contract period should apply.* Those who argue that the contract statute should apply generally do so by attacking the three arguments of the insurer, or by attempting to define the nature of the action or the defenses available to the insurance company.

1) *Nature of the action.* In an action against the insurer liability arises *solely* from the contract and not from a breach of any common law duty to refrain from tortious injury to a person.⁵⁸ The duties of the insurance company are found in its promises appearing in the insurance contract. To apply a tort statute of limitations to an action on a contract merely to preserve evidence concerning the automobile accident⁵⁹ cannot be justified.

2) *Defenses available to the insurer.* The insurance company cannot use procedural defenses which would have been available to the uninsured motorist in an action by the insured against the uninsured motorist. These defenses are personal defenses which operate to bar recovery *only* against a particular individual, and not against parties who have *no relationship* to that party, but are liable for the injuries suffered by the plaintiff. The insurer has no contractual or other personal relationship with the uninsured motorist which could entitle him to use this personal defense. In fact, if any relationship does exist, it is as an adversary because the insurance company is subrogated to the rights of its insured.⁶⁰ Furthermore, the obligations of the insurance company arise under a contract to provide *first party* benefits to its insured. It cannot claim that it has stepped into the shoes of the tortfeasor because the obligations arising under a contract are not coextensive with the obligations of the uninsured motorist, but go beyond.

3) *Meaning of "legally entitled" limited to fault.* Widiss argues that if the phrase "legally entitled" means only that the insured must establish that the proximate cause of his injuries was due solely to negligence of the uninsured motorist, then the only relevant question is whether the insured had a cause of action at one time against the irresponsible motorist. It would be immaterial whether or not a cause

⁵⁸ *Schleif v. Hardware Mut. Fire Ins. Co.*, 404 S.W.2d 490 (Tenn. 1966). But see *Johnson v. General Motors Corp.*, 242 F.Supp. 788 (E.D. Va. 1965) where the federal court held, for purpose of diversity of citizenship, an action against "John Doe" (Virginia's special procedure for suing a hit-and-run driver no found) is an action in tort, and therefore, the uninsured motorist insurance carrier is not an interested party and the diversity can not be based on the company's residency.

⁵⁹ Admittedly it is a more difficult task to preserve evidence concerning an accident than preserving evidence surrounding a contract because the most effective evidence in the tort claim comes from human memories and changing environment while the contract is easily preserved on paper.

⁶⁰ *Application of Travelers Indem. Co.*, 226 N.Y.S.2d 16 (1962); But see *Application of Nationwide Ins. Co.*, 39 Misc.2d 782, 241 N.Y.S.2d 589, 592 (1962): "By the insurance policy petitioner stands in the shoes of the hit-and-run driver for the purpose of determining whether it will be liable to respondents."

of action against the uninsured motorist was barred by the statute of limitations at the time the insured made his claim under the Uninsured Motorist endorsement in a automobile policy issued to him.⁶¹

4) *Fallacy of the insurer's subrogation argument.* A party who is uninsured is more than likely to be financially irresponsible. Any judgment against such a party would probably have less value than the costs of the subrogation suit. Not only is a judgment worthless, but the uninsured motorist has to be located or proved to be within the jurisdiction of the court in which the suit is commenced, which may be a rare occurrence. Therefore, it would appear imprudent to limit the possibility of compensation to an innocent individual upon a contract of indemnity insurance, merely because the insurer, by reason of a procedural bar, cannot maintain an action which, almost universally, is worthless anyway.⁶² If the company is in fact concerned about its subrogation rights, then

[T]he company has a more than sufficient position from which to protect its subrogation rights without relying on the insured to protect its position by either having the insured present a claim or initiate an action against the uninsured motorist. . . . Rather than allowing the insurer to use the running of the tort statute of limitations as a shield, it would seem far more sensible to require that in such a case the insurer should be obligated to keep track of the dates and make sure that both its own and its client's right against the uninsured motorist are not lost by the failure to initiate an action before the statute has run.⁶³

5) *Uninsured Motorist claim does not "sound in tort."* Implied in several of the insurer's arguments for holding that the tort prescription period should apply is the premise that the suit is an action which "sounds in tort" because the elements of a tort must be established. However, an action which "sounds in tort" is an action whereby the defendant has a "double liability"—one in contract and one in tort. The only relation of the uninsured motorist claim to such is the necessity of fault—the insurer has committed no tort and could not be held liable in a tort action against it. Therefore, any consideration based on the stated or implied premise that the action against the insurance company "sounds in tort" is erroneous.⁶⁴

⁶¹ WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 2.23(1) (1969).

⁶² Laufer, *Insurance Against Lack of Insurance? A Dissent From the Uninsured Motorist Endorsement*, 1969 DUKE L. J. 227 (1969). (At end of 1967, New York's MVAIC had only recovered 2.6 cents for each dollar it paid out); WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 2.23(2) (1969).

⁶³ WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 51 (1969). As to Widiss' final suggestion in this quote, see Cal. Ins. Code § 11580.2(j) note 82 *infra*.

⁶⁴ H. Hentemann, *Uninsured Motorist Coverage*, 12 CLEV-MAR L. REV. 67 (1963); The author proposes a caveat—If the arbitration clause is not to be given effect under state laws, then the tort prescription period would have to apply since action must be brought against the uninsured motorist to establish the right to collect under the coverage. See discussion on the effect of the invalidity of compulsory arbitration, *supra*, 18.

2. *Sahloff v. Western Casualty & Surety Company*

The latest case considering the question of which statute of limitations applies is *Sahloff v. Western Casualty & Surety Co.*⁶⁵ In *Sahloff* the plaintiff commenced a suit against his insurer, Western Casualty, to recover for bodily injuries allegedly caused by an uninsured motorist, five years and eleven months *after* the date of the accident. The defendant demurred on the ground that the cause of action sounded in tort and was subject to the three year statute of limitations prescribed by Wisconsin Statute § 983.205 (1) (1967). The trial court overruled the insurer's demurrer to the complaint.

On appeal, the appellant-insurer presented the three arguments discussed above:

- (1) Because the tort statute of limitations has run and barred any suit against the uninsured motorist, the insured consequently has no rights under the terms of the endorsement requiring that he be "legally entitled to recover";
- (2) That the insured's claim for injuries is based upon the negligent tort of the uninsured motorist and therefore possesses the character of that action in tort; and
- (3) That once the tort statute of limitations has run, the insurance company is foreclosed from exercising its subrogation rights against the uninsured motorist as provided in the endorsement and it is unfair to allow recovery against it.

The supreme court rejected all three of the insurer's arguments in an opinion which cited many of the leading decisions and articles which had considered the issue in any substantial detail.

In rejecting the insurer's first argument the court commented that it "seems hardly appropriate,"⁶⁶ since the issue was which statute of limitations applied, and not whether a cause of action existed against the uninsured motorist. However, the court did answer the "merits" of the argument:

[T]he phrase "legally entitled to recover" raises the question of whether the insured needs to have only a cause of action against the uninsured motorist or whether his claim must also be enforceable at the time of his suit against his insurer. We think *the phrase was used only to keep the fault principle as a basis for recovery against the insurer . . .*⁶⁷

The court further noted that the purpose of the coverage provided by statute⁶⁸ and the standard endorsement (both of which contain the phrase "legally entitled") was to provide compensation for an innocent victim's injuries, not to provide free liability insurance for an uninsured motorist. "Therefore," the court argued that:

⁶⁵ 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

⁶⁶ *Id.* at 68, 171 N.W.2d at 917.

⁶⁷ *Id.* at 69, 171 N.W.2d at 917. (emphasis added).

⁶⁸ WIS. STAT. § 204.30(5) (1967).

[I]t is neither necessary under the coverage nor desirable public policy to place the indemnity insurer in exactly the same position of a liability insurer of an uninsured motorist.⁶⁹

Nor was the court "sympathetic" with the insurer's second argument which it described as only another phase of the argument that the insurance company is to be put in the shoes of the uninsured motorist, an argument rejected above. The court clearly indicated that the action by the insured against the insurer, whether it be by judicial process or arbitration, "is an *action on the policy* and *sounds in contract*"⁷⁰ even though the insured must prove the causal negligence of the uninsured motorist.

The final argument of the insured, involving loss of subrogation rights, fared not better than the first two arguments. The court agreed with Widiss and Laufer⁷¹ on the point that the insurer's subrogation rights are "not worth much," but if the insurer wanted to protect those rights, under the endorsement he could compel the insured to commence an action, either before or after payment, against the uninsured motorist and thereby preserve its claim.

3. Legislative Enactments Limiting Time to Make a Claim Under the Uninsured Motorist Endorsement.

In at least one state, California,⁷² the legislature has set special time limitations upon the insured in which he can take action to perfect his claim against his insurer. By making a formal demand for arbitration, settling with the insurer, or instituting a suit against the uninsured motorist within one year from the date of the accident the insured can toll the running of the statute. The California courts are enforcing this section even in unusual circumstances, as evidenced by *Firemen's Insurance Co. v. Diskin*.⁷³

In *Diskin* the insureds, California residents, were injured when the taxi in which they were riding crashed into a fire hydrant in Miami, Florida. Fourteen months later the taxi company's insurer became insolvent, a fact which the insureds had not become aware of until twenty-two months after the accident. Two months after learning of the insolvency, the plaintiffs commenced arbitration proceedings to recover their damages. *Firemen's* then brought an action for declaratory relief against the insureds, one of the grounds being that the insureds were

⁶⁹ *Sahloff v. Western Cas. & Surety Co.*, 45 Wis. 2d at 70, 171 N.W.2d at 918.

⁷⁰ *Id.* at 70, 171 N.W.2d at 918.

⁷¹ See note 66, *supra*.

⁷² CAL. INS. CODE § 11580.2(i) Limitation of actions

(i) No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless within one year from the date of the accident:

(1) Suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction, or

(2) Agreement as to the amount due under the policy has been concluded, or

(3) The insured has formally instituted arbitration proceedings.

⁷³ 255 Cal. App.2d 503, 63 Cal. Rptr. 177 (1967).

barred in the making of their claim under section 11580.2 of the California Insurance Code. The court agreed and held that the arbitration proceedings were invalid.

California has since eased the harshness of the *Diskin* decision by amending the Code to provide that the insurance company must give 30 days notice to its insured prior to the running of the statute of limitation; failure to comply with this requirement tolls the running of the statutory period.⁷⁴

IV. CONCLUSION

With the exception of one area involving disputes centered around the meaning and scope of the language "legally entitled to recover," a minimal amount of case law has developed. This may be due to various factors—either the questions are only academic or the language of the endorsement has not been in existence for a period of time necessary to develop a substantial body of case law. Whatever the reason, the public is still not satisfied with the present system of automobile accident reparations. This dissatisfaction has been indicated by several surveys,⁷⁵ Congressional action, and the introduction of new automobile accident reparation plans.

Congressional action began on January 26, 1967, when Senator Thomas Dodd (D Conn) introduced a bill calling for the establishment of a Federal Motor Vehicle Insurance Guaranty Corporation.⁷⁶ This bill recommended the establishment of a program similar to the Federal Deposit Insurance Corporation for the protection of those whose insurers become insolvent. A half year later, on June 30, 1967, Representatives Peter Rodino, Jr. (D NJ) and William Cahill (R NJ) sent a joint letter to Emmanuel Celler (D NY), Chairman of the House Judiciary Committee and its Antitrust Subcommittee, calling for an investigation of automobile insurance business practices.⁷⁷ After three months, the Committee issued a 183-page report indicting the automobile industry and the tort-fault system.

During the Antitrust Subcommittee's study, Senator Warren Magnuson (D Wash), Chairman of the Senate Commerce Committee and Representatives John Moss (D Cal), member of the House Commerce

⁷⁴ CAL. INS. CODE § 11580.2(j) Notice of Limitation of actions

(j) Notwithstanding the provisions of subdivision (i), any insurer whose insured has made a claim under his or her uninsured motorist coverage, and such claim is pending, shall, at least 30 days before the expiration of the applicable statute of limitation, notify its insured in writing of the statute of limitations applicable to such injury or death. Failure of the insurer to provide such written notice shall operate to toll any applicable statute of limitation or other time limitation for a period of 30 days from the date of such written notice is actually given.

⁷⁵ For example see, O'Connell and Wilson, Car Insurance and Consumer Desires (1969) where a survey taken under the supervision of the authors is analyzed and discussed.

⁷⁶ S 688, 90th Cong., 1st Sess., 113 Cong. Rec. pt. 2 at 1667-70 (1967).

⁷⁷ H. R. Rep. No. 815 at 1 (90th Cong. 1st Sess. Oct. 24, 1967).

Committee, began conferring with the then Secretary of Transportation, Alan Boyd. Out of this action on December 14, 1967, came House Joint Resolution 958 and Senate Joint Resolution 129, calling for a two million dollar study by the Department of Transportation (DOT) of the entire automobile reparations system. After several hearings on the Resolutions, they were signed into law and a 1.6 million dollar appropriation was given to DOT so it could complete its work and report its recommendations to the President and Congress by May, 1970⁷⁸

In addition to the government studies and investigations, several compensation plans have been introduced by private individuals and associations. The most notable are:

- (1) Basic Protection Plan for the Traffic Victim—
Professors Keeton and O'Connell;
- (2) Personal Protection Automobile Insurance Plan—
American Insurance Association (AIA); and
- (3) Responsible Reform—
Defense Research Institute (DRI)

The environment which forced the introduction of the Uninsured Motorist endorsement during the years of 1954-56 has been duplicated (only in larger scale) today. It is evident that a change will be made. The change may maintain the fault principle. However, if that principle is maintained, the compensation benefits will be liberalized. To accomplish this liberalization, it is this author's opinion that the Uninsured Motorist endorsement will be replaced by its obvious successor, the "Under-insured Motorist Protection Plan," which would guarantee the same amount of coverage for the benefit of the insured as his liability endorsement provides for the benefit of parties injured by his negligence.

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⁷⁸ Address by Edward C. Germain, June 26, 1969. At the time of this paper, May 9, 1970, the DOT Report had not yet been issued.